No. 86-6 (4)

In The
Supreme Court of the United States
October Term, 1986

JAMES G. RICKETTS, *et al.*,
Petitioners,

vs.

JOHN HARVEY ADAMSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Are state court findings that a plea agreement required the defendant to testify and that his refusal to do so was a breach findings of historical fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d)?

2. When a defendant signs a plea agreement stating that he understands that if he breaches the agreement he will be subject to prosecution on the original charge and the death penalty that accompanies it, and then after pleading guilty to a lesser charge he deliberately breaches the agreement, does the double jeopardy clause prevent prosecution on the original charge?

PARTIES

Petitioners are James G. Ricketts, Director, Arizona Department of Corrections, and Donald Wawrzaszek, Superintendent of the Arizona State Prison; Respondent is John Harvey Adamson.

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2. The Ninth Circuit's memorandum decision in 1981 affirming the district court's dismissal of Adamson's first federal habeas, and agreeing with the district court's and the Arizona Supreme Court's findings that Adamson forfeited double jeopardy protection by the terms of the agreement and breached the agreement. *Adamson v. Hill,* No. 80-5941, Memorandum Decision (9th Cir. Nov. 30, 1981), *cert. denied,* 455 U.S. 992 (1982).

3. The Arizona Supreme Court's affirmance of Adamson's conviction and death penalty following his trial for first-degree murder. *State v. Adamson,* 136 Ariz. 250, 665 P.2d 972, *cert. denied,* 464 U.S. 865 (1983).

4. The Ninth Circuit's panel opinion affirming Adamson's conviction for first-degree murder and his death penalty. *Adamson v. Ricketts,* 758 F.2d 441 (1985).

5. The Ninth Circuit's en banc opinion reversing Adamson's conviction for first-degree murder and his death penalty. *Adamson v. Ricketts,* 789 F.2d 722 (9th Cir., en banc, 1986).

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit denied petitioners' motion for rehearing June 6, and the petition for certiorari was docketed in this Court July 3.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent portion of the Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

The Crime

June 2, 1976, John Harvey Adamson attached an explosive device to the underside of the Datsun newspaper reporter Don Bolles drove. While Adamson was doing this, Bolles was in the Clarendon House Hotel, lured there by Adamson in hopes Adamson would give him information concerning a story. After placing the bomb, Adamson left the Clarendon and placed a telephone call to Bolles, who was still waiting in the lobby of the Clarendon.

Adamson told Bolles he could not meet with him that day, and they agreed to meet later. Bolles left and as he began to back out of his parking space, the bomb was detonated by a cohort of Adamson with a remote control device at the far end of the parking lot. The force of the explosion literally tore Bolles apart. With three limbs amputated, he lingered for 11 days. Before dying, he identified a picture of Adamson as the man who made the appointment to meet him at the Clarendon House. *State v. Adamson,* 136 Ariz. 250, 253, 665 P.2d 972, 975, *cert. denied,* 464 U.S. 865 (1983); (J.A. at 33-35).[1]

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1. The Ninth Circuit decided the double jeopardy issue against Adamson in his first habeas corpus action, *Adamson v. Hill,* memorandum decision, No. 80-5941 (9th Cir., Nov. 30, 1981), *cert. denied,* 455 U.S. 992 (1982). Adamson did not argue double jeopardy to the district court in his second habeas action, nor in his briefs to the Ninth Circuit panel that affirmed his conviction and death penalty in *Adamson v. Ricketts,* 758 F.2d 441 (9th Cir. 1985). Also he did not raise it in his brief suggesting rehearing en banc. After the en banc court, by order of July 12, 1985, instructed the parties to brief that settled issue, he addressed it in his supplemental brief on rehearing en banc. At page 12, n.7 of that brief, he said that he had not "emphasized" that issue because it had been rejected in his first habeas, but claimed he had preserved it in his amended petition before the district court. He cited to the amended petition paragraph 8(H). The correct citation is paragraph IX(H) of the amended petition in the second habeas, but that argument focuses upon alleged arbitrary and capricious imposition of the death penalty, not double jeopardy.

Because it was impossible to decide the double jeopardy claim without examining the record from *Adamson v. Hill,* the first habeas case, defense counsel moved the Ninth Circuit to augment the record in this case with that record. (J.A. at 175-76.) Petitioners did not oppose the motion and the Ninth Circuit granted it August 30, 1985. (J.A. at 177.)

Because petitioners will cite to both records, we will distinguish them by referring to the first habeas case as *Hill* and the second habeas action, the case at hand, as *Ricketts.*

From information Bolles told them before he died, police obtained a search warrant for Adamson's apartment. In it they found materials similar to those used to make the bomb attached to Bolles' car. *State v. Adamson, supra,* 136 Ariz. at 253-54, 665 P.2d at 975-76.

After the bombing, Adamson bragged to an acquaintance that he had received $10,000 for the killing from people who wanted Bolles eliminated because "this guy was giving people a lot of hard times and stepping on people's toes." *State v. Adamson, supra,* 136 Ariz. at 254-56, 665 P.2d at 976-78.

The First Trial

In June 1976 the state charged Adamson with murder. While jury selection was in progress, the parties entered into a plea agreement. Adamson agreed to plead guilty to second-degree murder, to receive a sentence of 48 to 49 years to date from June 13, 1976 (the date of his arrest), with actual incarceration to be 20 calendar years and 2 calendar months. (J.A. at 195.) Paragraph 4 of that agreement required Adamson's full and complete testimony in any court, state or federal, when requested by the proper authorities against any and all parties involved in the murder of Don Bolles, and in other specified cases included in the plea agreement and the attachments to the plea agreement. (J.A. at 196.) Paragraph 5 of the agreement specified that Adamson would testify truthfully and completely at all interviews, depositions, hearings and trials, whether under oath or not, to the crimes mentioned in the agreement. That same paragraph provided that, if Adamson refused to testify at

any time, or if he testified untruthfully or omitted any material fact in his statements, the entire plea agreement would be null and void and the original charge would be automatically reinstated. He would then be subject, the agreement continued, to the charge of open murder and, if found guilty of first-degree murder, to the penalty of death or life imprisonment. The state would also be free to file any charges that had not been filed on the date of the agreement. (J.A. at 196.) Paragraph 15 of the plea agreement further provided that if the agreement became null and void, the parties would be returned to their original positions before the plea agreement. (J.A. at 199.) In exchange for his cooperation, the state agreed not to prosecute Adamson for numerous crimes listed in paragraph 6 of the agreement. (J.A. at 197.) The parties agreed to waive the time for sentencing until the conclusion of Adamson's testimony in all of the cases referred to in the agreement and Exhibits A and B attached to it. (J.A. at 197.)

Adamson was assisted by three attorneys, who reviewed the plea agreement and discussed it and the case with him. At the change-of-plea hearing, Adamson told the trial court that he had 4 years of college. (J.A. at 17.) Judge Birdsall went over every paragraph of the plea with Adamson, asking him whether he had any questions about any provision. When the judge asked Adamson whether he understood the meaning of paragraphs 4 and 5 of the plea agreement, and whether he understood that if the plea agreement were declared null and void, he would be subject to the original charge and a possible penalty of death, Adamson replied that he did understand that. (J.A. at 21-23.) Adamson also indicated that he

understood, according to paragraph 15 of the plea agreement, that if the agreement became null and void, that he would face the charge of open murder. (J.A. at 28-29.) All three of Adamson's attorneys signed the agreement, beneath the paragraph that stated they had discussed the case and the plea agreement with Adamson, had advised him of his rights and the conditions of the plea, and concurred in his decision to enter the plea. (J.A. at 32, 214.) Adamson stated that he was satisfied with the representation of all three attorneys. (J.A. at 35-36.) Judge Birdsall accepted the plea, but deferred sentencing pursuant to the provisions of the plea agreement. (J.A. at 33, 35, 41.)

Thereafter Adamson testified against Max Dunlap and James Robison about their involvement in the murder of Don Bolles. They were both convicted of first-degree murder and both were sentenced to death. When that trial was finished, Adamson was sentenced. (J.A. at 46-49.)

The Reversals

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison. *State v. Dunlap,* 125 Ariz. 104, 608 P.2d 41; *State v. Robison,* 125 Ariz. 107, 608 P.2d 44 (1980). As the state prepared to retry them, Stanley Patchell, an assistant attorney general, called William Feldhacker on April 2 to discuss Adamson's availability for interviews in preparation for his testimony. The next day Mr. Feldhacker wrote Mr. Patchell a letter informing him that he and his partner had met with Adamson, and that Adamson believed he had

fully complied with and completed the plea agreement, that he had no further obligations, and that he would not testify at the retrial. (J.A. at 200-04.) Through his attorney, Adamson acknowledged that he knew the Attorney General would not share his belief that he had completed his obligations under the plea agreement, that the Attorney General might consider the plea agreement breached and that if the agreement were breached the state could prosecute him for the killing of Donald Bolles on a first-degree murder charge. (J.A. at 201.) Adamson then went on to list his new "demands" to which the state would have to accede if it expected his testimony at a retrial. (J.A. at 201-03.)

The Prosecutor's Response

April 9, 1980, William J. Schafer, an assistant attorney general, replied to Adamson's letter. He stated that the plea agreement was still in effect and that the state had the right to call upon Adamson for testimony and interviews. The second paragraph of the letter said that the state had called upon Adamson, through his attorneys, for an interview regarding his testimony at the retrial but that Adamson's attorneys refused to allow him to be interviewed. (J.A. at 205.)

That refusal to be interviewed, stated the letter, was a violation of the plea agreement and, because of that, the state could, as the plea agreement provided, refile the original murder charge, which would subject Adamson to the death penalty.

Hearings in Preparation for Retrial

The retrial of Dunlap and Robison was set for May 1980. At a series of hearings in preparation for the retrial, the state attempted to compel Adamson, pursuant to the plea agreement, to answer questions. At the initial hearing, April 18, 1980, Judge Myers ordered Adamson to answer a question but Adamson's attorney objected and Adamson refused to answer and claimed the protection of the Fifth Amendment. He argued that because the state had informed him that they considered his refusal to testify a breach of the plea agreement, he could not now risk incriminating himself by testifying. Judge Myers upheld Adamson's invocation of the Fifth Amendment. (J.A. at 50-53.)

The state then filed a motion to compel testimony pursuant to the plea agreement. (J.A. at 54-55.) At the hearing on that motion, the prosecutor argued that Adamson was obligated, pursuant to the terms of the plea agreement, to cooperate in preparation for a retrial; and the prosecutor asked the court to construe the plea agreement to determine whether Adamson was in violation of it. (J.A. at 56-57.) Although Judge Myers did not construe the plea agreement, he denied the state's motion to compel Adamson to testify. (J.A. at 58.) At that same hearing, which had been scheduled as a deposition of Adamson noticed by Robison's attorney, Adamson invoked the Fifth Amendment and refused to testify. (J.A. at 58-59.) At that same deposition, when an assistant attorney general asked Adamson, in the words of the plea agreement, whether he would invoke the Fifth Amendment and refuse to give any testimony, whether under oath or not, at all interviews,

depositions, hearings and trials, Adamson, after consultation with his attorneys, responded that he would refuse to testify. (J.A. at 59-60.)

With the retrial of Dunlap and Robison just a few weeks off the state tried once again to obtain Adamson's cooperation but he refused. His attorney objected that Adamson had fulfilled the plea agreement and, moreover, that no one had jurisdiction over the plea agreement or John Harvey Adamson and that the superior court could not rule on anything in the plea agreement. (J.A. at 61.)

The state then filed a special action in the Arizona Supreme Court, asking them to review Judge Myers' refusal to compel testimony pursuant to the plea agreement, but that court declined to accept jurisdiction. (J.A. at 111.)

The state filed an information on May 8, 1980, charging John Harvey Adamson with open murder in the killing of Don Bolles. (J.A. at 62.) The superior court issued a warrant pursuant to that information and Adamson moved to quash the warrant and strike the information. (*Hill*, CR 3, Exhibit J.) After a hearing on May 12 Superior Court Judge French denied Adamson's motions and refused to halt the prosecution. (J.A. at 111.)

Adamson then filed a petition for special action in the Arizona Supreme Court. He argued that he already stood convicted of second-degree murder under a plea agreement and was serving his sentence, and that allowing the prosecution upon the greater charge would violate double jeopardy. (J.A. at 63-66.) The state responded that Adamson had breached his agreement with the state and because of that breach he had waived any claim to jeopardy on reinstatement of the original charge. (J.A. at 74-77.)

The Arizona Supreme Court set a hearing date of May 28 for Adamson's special action. The state then filed another motion in superior court seeking to push the date for the Dunlap-Robison retrial back further than May 21, but the trial court denied the motion. On the next day, May 16, Adamson moved to dismiss his own special action in the supreme court. He stated that an adequate record had been made in the lower courts to establish his position about double jeopardy and that he could proceed through the normal channels of appeal if the state continued with the prosecution. (J.A. at 80-81.) The state opposed the motion, pointing out that Adamson had filed it only after Judge Myers, the day before, had refused to grant the state a continuance of the rapidly approaching retrial of Dunlap and Robison. (J.A. at 83.) Adamson's counsel replied that he was not asking any court to determine any issue about the plea agreement, and did not intend by his allegations in the special action to raise the interpretation of the plea agreement. (J.A. at 86-87.)

The supreme court did not dismiss Adamson's special action and on May 28, 1980, had a hearing to determine whether the court would take jurisdiction over the matter. At the hearing Adamson's counsel made it plain that he did not want the court to construe the plea agreement or determine whether Adamson breached it. He wanted the court to focus only upon his double jeopardy argument, but the court refused to limit the hearing and both counsel argued the merits of the plea agreement and Adamson's breach. (J.A. at 88-93.) Assistant Attorney General William J. Schafer asked the supreme court to take jurisdiction to decide a single issue, from which all other issues flowed, whether the plea agreement obligated Adamson to

testify against Dunlap and Robison. Schafer asserted that it did and that Adamson had breached it when he refused to testify. (J.A. at 94-95.)

The next day, May 29, the Arizona Supreme Court issued its opinion holding that the terms of the plea agreement required Adamson to testify at a retrial, that he had breached the agreement, and that the state could proceed with the prosecution for first-degree murder. That court vacated his conviction and sentence for second-degree murder. (J.A. at 115.) But Adamson still refused to testify and the state moved to dismiss the case against Dunlap and Robison, now set for June 2.[2] Based upon the state's position that it could not proceed, the superior court granted the motion and dismissed the case against Dunlap and Robison without prejudice against refiling in the future. (Petitioners' answering brief in *Hill*, at 8.)

Adamson then took his case to federal court, filing a petition for writ of habeas corpus arguing that his obligations under the plea agreement terminated when he was sentenced and that he had not breached the agreement. (*Hill*, CR 3, supplemental petition, at 3; CR 4, memo in support of supplemental petition, at 5-10.) The state moved to dismiss the petition, asserting that whether Adamson breached the plea agreement was a state question, not a federal one, and that the double jeopardy clause did not prevent his trial upon the original charge. (*Hill*, CR 8, at 3, 5-7.) District Judge Muecke heard oral argument on September 26, 1980, and on the same day issued an order dismissing the petition as "legally frivolous."

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2. The Arizona Supreme Court had stayed the trial proceedings until disposition of the special action.

(J.A. at 133-37.) Adamson moved to amend the findings and the judgment; Judge Muecke denied those motions in an order characterizing the interpretation of a plea agreement as a matter of state law. (J.A. at 138-39.) Adamson appealed the dismissal to the Ninth Circuit Court of Appeals. (J.A. at 154.)

In its order of April 24, 1981, the Ninth Circuit directed the parties to address what effect this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), would have on that court's review of the Arizona Supreme Court's finding that Adamson was required under the plea agreement to testify at the retrial of Dunlap and Robison. The Ninth Circuit also asked the parties to discuss what effect various provisions of 28 U.S.C. § 2254(d) would have on its review of the Arizona Supreme Court's findings. (J.A. at 155.)

Adamson argued that the Arizona Supreme Court's interpretation of the plea agreement was erroneous, and that he had not breached it. He did not argue that he did not understand that if he breached the plea agreement, he could be prosecuted for first-degree murder.

In a memorandum decision, the Ninth Circuit rejected his contention, saying that the interpretation of the plea agreement reached by the Arizona Supreme Court and the federal district court was "eminently reasonable." The Ninth Circuit accorded a presumption of correctness to the state court's findings and held that Adamson had not overcome it. (J.A. at 156-63.) This Court denied certiorari. *Adamson v. Hill*, 455 U.S. 992 (1982).

The Second Trial

While the previous proceedings were in progress, the state tried Adamson for first-degree murder. He was convicted and, after an aggravation/mitigation hearing, the trial court sentenced him to death. The Arizona Supreme Court affirmed the conviction and the sentence. *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972, *cert. denied*, 464 U.S. 865 (1983).

Adamson then sought federal habeas relief for a second time in December 1983, but he did not argue the double jeopardy issue in his petition. (*Ricketts*, CR 1, 16.) District Judge Muecke denied relief and Adamson appealed. (*Ricketts*, CR 24, 29.) In his brief to the Ninth Circuit Adamson did not raise the double jeopardy issue, and in its panel decision affirming the district court's dismissal of the petition, the Ninth Circuit noted, as part of the factual background of the case, that it had decided the double jeopardy issue against Adamson in 1981. *Adamson v. Ricketts*, 758 F.2d 441, 444-45 n.3.

The Ninth Circuit granted Adamson's request for rehearing en banc. By order of July 12, 1985, it instructed the parties to argue two issues: (1) whether the double jeopardy clause barred his conviction and sentence of death following his conviction and sentence pursuant to the plea agreement; (2) whether the application of the death penalty was arbitrary on the grounds that the state sought it and the sentencing judge imposed it vindictively. (J.A. at 174.) Adamson then argued in his supplemental brief on rehearing en banc that it was "unrebutted that Mr. Adamson did not believe he was waiving his rights, did

not intend to waive his rights, ..." (Adamson's Supplemental Brief on Rehearing En Banc, at 16.) Judge Brunetti, dissenting from the en banc court's reversal, noted that Adamson did not raise the double jeopardy issue in the district court or on his appeal from the district court, but for the first time in the habeas proceeding in his supplemental brief on rehearing en banc. *Adamson v. Ricketts,* 789 F.2d 722, 735 n.1 (9th Cir., en banc, 1986). (J.A. at 207.)

Divided 7-4, the en banc court held that Adamson did not waive the protection of double jeopardy either by the terms of the plea agreement or by his deliberate course of conduct. (J.A. at 182-93.) The Ninth Circuit denied petitioners' request for a rehearing June 6, 1986, and the petition for certiorari was docketed in this Court July 3.

SUMMARY OF ARGUMENT

Interpretation of a plea agreement in a state criminal proceeding is a question of state law. When the Arizona Supreme Court determined the obligations of the parties, and concluded that Adamson had breached the agreement and that the state might proceed with the prosecution for first-degree murder, those findings of historical fact were entitled to a presumption of correctness under 28 U.S.C. § 2254(d). The Ninth Circuit could not set them aside unless they were not fairly supported by the record, and the record abundantly sustains them.

Even if the Arizona Supreme Court's conclusions were not entitled to a presumption of correctness, they are still the proper interpretation of the plea agreement.

The language of the plea agreement made it clear to Adamson that, if he violated it, he faced reprosecution on the original charge and the possible death penalty. Insertion of the phrase "double jeopardy" in the plea agreement would not have added anything that was not already there and understood by all the parties. This Court has never required an express waiver of double jeopardy protection, but has always examined the role of the defendant in bringing about a retrial.

By his deliberate, defiant actions, Adamson breached the plea agreement with full knowledge of the consequences. Because he was responsible for the nullification of the agreement, nothing in the double jeopardy clause prevented his trial for first-degree murder.

ARGUMENTS

I

INTERPRETATION OF A PLEA AGREEMENT IN A STATE CRIMINAL PROCEEDING IS A STATE QUESTION, AND THE ARIZONA SUPREME COURT'S FINDINGS WERE ENTITLED TO A PRESUMPTION OF CORRECTNESS AND ARE AMPLY SUSTAINED BY THE RECORD.

This issue in this case is a very simple one. It involves the meaning of a plea agreement and whether John Harvey Adamson breached it. Judge Kennedy noted in his separate dissent:

> In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It

> gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

(J.A. at 241.) Also dissenting, Judge Brunetti stated that the majority had simply misinterpreted the plea agreement. Judge Kennedy noted that the critical issue in this case was whether Adamson's acts were in breach of the agreement. That issue, he correctly observed, was one of state law, nothing more. It depended upon primary and historical facts which the Ninth Circuit had no authority to determine and, Judge Kennedy went on to say, even if the Ninth Circuit did have the authority to review the state supreme court's interpretation of the plea, there was ample support for that court's finding that Adamson breached the agreement. (J.A. at 240-41.)

This Court has often said that states are the ultimate expositors of their laws, and that federal courts are bound by those constructions except in extreme circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). The Ninth Circuit has also recognized that it is bound by state court construction of state statutes. *Knapp v. Cardwell*, 667 F.2d 1253, 1260, *cert. denied*, 459 U.S. 1055 (1982). The interpretation of a state plea bargain is a state question. When the provisions of the agreement contain a clear forfeiture of protection against reprosecution in case of a breach, and the state supreme court determines that the defendant understood that, and that he breached the agreement, those factual findings are entitled to the presumption of correctness by a federal appellate court unless they are not fairly supported by the record. The federal

court's disagreement with the state court's interpretation does not transform the determination of the rights of the parties under that agreement into a federal question.

This Court has before it a plea agreement, arrived at after a bargaining process, and after the parties had the opportunity to examine the rights forfeited and the benefits obtained. Whether Adamson forfeited double jeopardy protection if he violated the agreement depended upon the provisions of that agreement, which he entered into with the full assistance of three attorneys. This Court does not have before it an illiterate defendant who had no opportunity to consult with counsel, and no chance to consider the rights he was foregoing weighed against the benefits he would receive. Adamson informed the trial court that he had 4 years of college, that he was satisfied with the representation of all three counsel, and that he understood each of the provisions that Judge Birdsall went over with him in detail before Birdsall accepted the plea.

The Arizona Supreme Court, after full briefing and a hearing, found that Adamson understood the terms of the plea agreement and knew he would be subject to prosecution for first-degree murder and a possible death sentence if he refused to testify. Paragraphs 5 and 15 of the agreement, and common sense, make it evident that Adamson knew what would happen when he refused. Those paragraphs provide that if he refused to testify, or at anytime testified untruthfully, the entire agreement would be null and void and the original charge would be automatically reinstated. Paragraph 15 reemphasized this, in part, by stating that if the agreement became null and void, then the parties would be returned to the positions they were in before the agreement.

The question is not, as the Ninth Circuit majority erroneously conceived it, whether Adamson subjectively believed he was breaching the agreement. The question is whether he understood when he entered into the plea agreement that, if he breached it, the original charges would be automatically reinstated and the parties would be in the same positions they occupied before the plea was concluded. The language of those provisions is unmistakably clear and the Ninth Circuit's strained attempts to circumvent that language, and to read it out of context, are unpersuasive.

Petitioners have already pointed out that the Ninth Circuit's treatment of the Arizona Supreme Court's findings in 1981 contrasts, as night with day, the majority's treatment of the same findings under the same plea agreement in 1986. In *Adamson v. Hill, supra,* the Ninth Circuit, as it should have, accorded a presumption of correctness to the Arizona Supreme Court's findings about the meaning of the terms of the agreement and Adamson's breach of them. That court at that time held that Adamson was not able to overcome the presumption of correctness. (J.A. at 159-61.) As petitioners have noted, Adamson argued that the Arizona Supreme Court's interpretation of the agreement was erroneous, not that he did not understand that if he violated the agreement, he could be prosecuted for first-degree murder.

In 1986, looking at the same plea agreement, the Ninth Circuit majority concluded that, although paragraph 5 permitted the state to reinstitute the original charges if the agreement became null and void, that actually meant nothing because it did not say that Adamson was waiving

a defense of double jeopardy. (J.A. at 188-89.) Of course, that same paragraph refers to prosecution on the charge of first-degree murder and, upon conviction of that charge, a possible death penalty. (J.A. at 196.) It simply defies common sense to say that all the State of Arizona was bargaining for was the right to file a piece of paper charging Adamson with first-degree murder, but, if it did so, Adamson retained a perfect defense of double jeopardy.

Such reasoning is particularly unfathomable when one reads Adamson's letter of April 3, 1980, to the state. Judge Brunetti perceptively observed that the wording of that letter established that the statements were communications from John Harvey Adamson through his attorney to the prosecution. (J.A. at 223.) Almost every paragraph begins with "John Harvey Adamson . . . ." One need only look at paragraph three to realize that Adamson knew the plea agreement provided that the state could prosecute him on the original first-degree charge if he violated it. He even said in that paragraph that the Attorney General might not agree that he had completed his obligations under the plea and that if that office was successful in withdrawing the plea from him, he could be prosecuted for the killing of Donald Bolles on a first-degree murder charge. (J.A. at 201.) The last sentence of the penultimate paragraph is also very significant. There Adamson stated that it was his position that, without some type of stipulation, a superior court judge would not have jurisdiction to change or withdraw his plea agreement or sentence. (J.A. at 203-04.) In one breath Adamson recognized that if the state was successful in withdrawing the plea agreement, he could be prosecuted on a charge of first-degree murder and, in the next, he

stated his intent to prevent the superior court from construing the agreement to determine whether he was violating it.

Petitioners have demonstrated in the statement of the case that Adamson continually objected to the superior court's construing the plea agreement, and even tried to withdraw his special action before the Arizona Supreme Court when he found that they were going to construe the agreement. When one considers these facts, it is impossible to agree with the majority opinion that Adamson did not realize the consequences of a breach, or that he simply took a "reasonable" position in asserting his interpretation of the plea agreement. As the dissent points out, Adamson never described his position as "reasonable." (J.A. at 223.)

When the majority opinion refers to Adamson's actions as reasonable because Judge Myers upheld his invocation of the Fifth Amendment in a pretrial hearing, it does so without recognizing that Adamson's counsel objected to construing the plea agreement to determine whether Adamson had violated it. Myers' upholding Adamson's invocation of the Fifth Amendment was totally meaningless without interpreting the plea agreement because only a construction of that agreement could determine whether Adamson had the right to refuse to testify. In that series of pretrial hearings Adamson pursued exactly the course of action that he told the state he would in his letter of April 3, 1980—he refused to cooperate, and objected to the trial court's interpreting the plea agreement.

Ignoring the other clear provisions of the plea agreement, the majority of the Ninth Circuit focused only upon paragraph 8, which provided for delayed sentencing. But, as the Arizona Supreme Court found in 1980, the Ninth Circuit in 1981, and the four dissenters in 1986, that merely provided for a ministerial act of sentencing; it did not signal the end of Adamson's obligations under the plea agreement. Paragraph 8 does not say that sentencing shall be synonymous with the termination of all of Adamson's obligations under the plea agreement. Paragraph 4 required Adamson to testify fully and completely in any court, when requested by proper authorities, against any and all parties involved in the murder of Don Bolles. (J.A. at 196.) Paragraph 5 required him to testify truthfully at all times, whether under oath or not, to the crimes mentioned in the agreement. That included all interviews, depositions, hearings and trials. (J.A. at 196.) Repeated use of the plural in this series of nouns was no coincidence. A modicum of common sense makes it plain that the state was not bargaining for testimony at one trial, then, upon reversal, would have to renegotiate with Adamson for future testimony.

Having considered all the provisions of the plea agreement, the Arizona Supreme Court held:

> Although the plea agreement does not specifically spell out the duration of petitioner's obligations, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

(J.A. at 112.) That court made that finding after having considered the plea agreement, the transcript of the change-of-plea hearing, and after having heard oral argument May 28, 1980.

Adamson will probably rely here, as he did below, upon a colloquy at sentencing December 7, 1978. That colloquy is reproduced in full in the Arizona Supreme Court opinion. (J.A. at 113.) Immediately before Judge Birdsall sentenced Adamson, William J. Schafer, assistant attorney general, stated that he wanted the record to show that he had discussed with defense counsel that it might be necessary to bring back Adamson after sentencing for further testimony. Mr. Feldhacker and Mr. Martin, Adamson's counsel, stated that that was correct. Before the Arizona Supreme Court and in the district court proceedings in 1980 in *Adamson v. Hill,* defense counsel argued that that referred merely to the *Ashford Plumbing* case and not the Bolles murder. The Ninth Circuit accepted that in 1981 and said that even if that colloquy were so interpreted, it would cast no doubt on the accuracy of the Arizona Supreme Court's decision. (J.A. at 160.)

It is evident that Adamson at sentencing in 1978 did not say that he believed he had fulfilled all his obligations under the plea agreement, but, out of the goodness of his heart, he would testify after sentencing. As Judge Brunetti noted in his dissent, even if one accepts the assertion that the testimony alluded to was the *Ashford* case, defense counsel's admission at sentencing that Adamson would come back to testify was not an addition or amendment to the plea agreement, but was one of Adamson's obligations required by the plea agreement. The *Ashford* case was one

of the cases included in the exhibits to the plea agreement. (J.A. at 226-27.) As Judge Brunetti observed:

> Adamson can not assert a reservation for refusal to further testify after sentencing in the *Robison* and *Dunlap* Bolles murder cases, and at the same time acknowledge an obligation to testify in the *Ashford* case after sentencing. The plea agreement makes no such distinctions.

(J.A. at 228.) It really makes no difference to which case defense counsel was referring. The important thing is that he admitted Adamson's continuing obligation under the plea agreement to testify after sentencing.

Petitioners must correct a glaring misstatement of fact in the majority opinion. The majority says that immediately after the Arizona Supreme Court told Adamson he was obliged under the plea agreement to testify, he agreed to do so. (J.A. at 190.) What they do not say is that he was willing to do so only if he could retain the same sentence he had received under the plea agreement. The prosecutor told him that he would consider a sentence of life and nothing else. When Adamson refused that, the state prepared to try him on the original charge of murder. The state has not negotiated with him since. (*Ricketts,* CR 23, Answer to Amended Supplemental Petition for Habeas Corpus, at 8.)

Adamson argued before the Ninth Circuit in 1981 that, if that court rejected his appeal, it should allow him to "cure" his breach by returning him to the status quo prior to his refusal to testify. The Ninth Circuit said:

> In anticipation that this appeal would fail, Adamson suggests that this Court allow him to "cure" his breach of the plea agreement by returning him to the

> status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson acknowledged that he ran the risk of reprosecution for first-degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

(J.A. at 161.) To conclude otherwise, as Judge Brunetti noted in dissent, is to make nonsense of the plea agreement, and to grant Adamson, the breaching party, the unilateral right to defeat the clear enforcement mechanism of the agreement by allowing him to decide if he will choose to cooperate on his terms after he has breached the agreement and a court has told him that he has breached. (J.A. at 232.) He realized and admitted that risk in his letter of April 3, 1980.

In 1981 the Ninth Circuit decided this case correctly, giving, as it should have, the presumption of correctness to the state court's interpretation of the plea agreement and Adamson's actions breaching it. When one reads the agreement, applies common sense to the obvious objectives contemplated by it, the benefits received by Adamson, his breach of the agreement, his announced intent to prevent anyone from interpreting the agreement, and his subsequent course of conduct resisting interpretation of the agreement, it is incredible that the majority in 1986 came to the opposite conclusion.

II

BECAUSE ADAMSON'S DELIBERATE ACTIONS RESULTED IN HIS REPROSECUTION FOR FIRST-DEGREE MURDER, THE DOUBLE JEOPARDY CLAUSE DID NOT PREVENT THE PROSECUTION.

This Court does not have before it a defendant who chose to proceed through the trial process to conviction or acquittal of first-degree murder. Adamson could have done that, but he chose to enter into a plea bargain and not to permit a jury to determine his guilt or innocence of first-degree murder. It follows as an inevitable corollary that, if the Arizona Supreme Court's findings about the plea agreement and his breach of it are fairly supported by the record, Adamson was responsible for the renewed prosecution on the first-degree murder charge and cannot complain about a violation of double jeopardy.

This Court has said that double jeopardy protection is not the same kind of constitutional right as, for example, the right to counsel, and has implicitly rejected the contention that it must be expressly waived. *United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976). Long ago, this Court held that a defendant who successfully appealed his conviction had no double jeopardy objection because *his action* in appealing the conviction necessitated a new trial. *United States v. Ball*, 163 U.S. 662, 671-72 (1896). Nobody had to explain double jeopardy to Ball before he appealed, or forewarn him he could be retried if he was successful. Similarly, a defendant's motion for a mistrial, so long as it is not provoked by intentional prosecutorial misconduct, is no obstacle to a new trial whether or not the defendant had explained to him the meaning of double jeopardy.

United States v. Dinitz, supra; United States v. Jorn, 400 U.S. 470, 485 (1971). These cases, like *Ball,* focus upon the defendant's power to choose a course of action, either to let the issue of guilt go to the jury, or to take it from the jury.

In *Santobello v. New York,* 404 U.S. 257, 263 n.2 (1971), this Court said that, if the trial court permitted Santobello to withdraw his plea, the original charges could be refiled. There was no discussion about an express waiver of double jeopardy.

The Ninth Circuit has never required an express waiver of double jeopardy when the defendant successfully has a plea set aside. *United States v. Barker,* 681 F.2d 589, 590-91 (9th Cir. 1982).

When the defendant has been responsible for prosecution on the greater charge, other circuits have found no constitutional violation even absent a waiver in the record. *United States ex rel. Williams v. McMann,* 436 F.2d 103 (2d Cir. 1970), *cert. denied,* 402 U.S. 914 (1971); *Klobuchir v. Commonwealth of Pennsylvania,* 639 F.2d 966 (3d Cir. 1981); *Hawk v. Berkemer,* 610 F.2d 445 (6th Cir. 1979); *United States v. Anderson,* 514 F.2d 583 (7th Cir. 1975); *United States v. Williams,* 534 F.2d 119 (8th Cir. 1976), *cert. denied,* 429 U.S. 894 (1976); *Ward v. Page,* 424 F.2d 491 (10th Cir. 1970), *cert. denied,* 400 U.S. 917 (1970).

In *Jeffers v. United States,* 432 U.S. 137, 152 (1977), this Court saw no double jeopardy violation where Jeffers elected to be tried separately on two charges although one was a lesser-included of the other. Again, the focus was upon the *defendant's role* in bringing about the result. Judge Brunetti in his dissent aptly noted that Adamson's

case essentially is analogous to *Jeffers.* The only difference is that in *Jeffers* a second prosecution on the greater offense was a certainty; for Adamson it was contingent upon his breach of the plea agreement, and he breached it. (J.A. at 218-19.)

Probably the clearest expression about when double jeopardy affords no protection is *United States v. Scott,* 437 U.S. 82 (1978). Concluding that Scott could be retried on two counts that the trial court dismissed at Scott's reguest before the case went to the jury, Chief Justice Rehnquist said:

> [Double jeopardy] is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecuton.

437 U.S. at 96. Specifically declining to adopt a waiver analysis, this Court said:

> We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in *Greene.* Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 100.

When Adamson breached the plea agreement, he lost the protection of the double jeopardy clause by his voluntarily chosen course of conduct with full understanding of the consequences even though the agreement did not use the words "double jeopardy." The important thing for a defendant to know in such a situation is not the technical legal term that applies to his actions, but the consequences that will flow from his actions. When Adamson knowingly

agreed that if he breached the agreement, the original charge would be reinstated, he knew, without saying more, that he agreed to give up his double jeopardy rights. More words would not have made the consequences any clearer.

CONCLUSION

John Harvey Adamson did not want a jury to determine his guilt or innocence on the charge of first-degree murder in 1977, and he took that decision from the jury by entering a plea agreement. Counseled by three attorneys, and thoroughly questioned by the trial court about the meaning of every provision of that agreement, Adamson knew the consequences if he breached it. In his letter of April 3, 1980, he admitted that he knew what the consequences were if the state was successful in having the plea agreement voided. The Arizona Supreme Court did not err in its interpretation of the plea agreement, nor in its finding that John Harvey Adamson breached it. Adamson took a gamble trying to force additional concessions from the state. Because he did that with full knowledge of the consequences if he lost, double jeopardy affords him no protection.

This Court should reverse the Ninth Circuit's en banc decision.

Respectfully submitted,

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